IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Civil Revision 5513 of 1998

Date of decision: 17.1.2007.

Jagdev Singh and ors …Petitioners

Versus

Darshan Singh and others …Respondents

CORAM: HON'BLE MR JUSTICE S.S.NIJJAR.
HON'BLE MR JUSTICE S.S.SARON.

Present: Mr Arun Palli, Advocate and
Mr Jai Bhagwan, Advocate for the petitioners.
Mr Arihant Jain, Advocate for the respondents.

S.S.SARON, J.

This revision petition has been filed by the defendants-petitioners against the order dated 16.11.1998 passed by the learned Civil Judge (Jr Divn), Malerkotla whereby the plaintiffs-respondents have been allowed to examine a handwriting expert in their rebuttal evidence to prove documents, the onus of proof of which was on them.

The plaintiffs-respondents filed a suit for permanent and prohibitory injunction restraining the defendants-petitioners from dispossessing them from the land measuring 142 Bighas 10 Biswas, as detailed in the head note of the plaint situated in village Bhoodan, Tehsil Malerkotla, forcibly, illegally and without due process of law; besides for restraining the defendants-petitioners from alienating by way of sale, mortgage, exchange, gift or in any other manner the suit land. During the pendency of the suit, the plaintiffs-respondents, in their rebuttal evidence,

prayed for examination of a handwriting expert. It was submitted by the plaintiffs-respondents that their evidence in the affirmative was concluded on 11.3.1998 and they had reserved their right to produce evidence in rebuttal. Jagdev Singh (defendant-1) in his evidence, it is stated, did not clear the position as to whether the memo of partition dated 12.5.1989 and rapat roznamcha which was got entered with the Halqa Patwari on 29.7.1994 bears his signatures. The case set up by the plaintiffs-respondents is that the suit property was partitioned between the parties by way of a memo of partition dated 12.5.1989. Rapat roznamcha in this regard was got entered with the Halqa Patwari. The defendant-1 in his written statement did not deny his signatures on the memo of partition dated 12.5.1989 and rapat roznamcha that was entered with the Halqa Patwari. He simply stated that the documents were void and a result of fraud. However, when the said Rapat roznamcha was put to defendant-1 during his cross examination, he did not specifically state whether the said documents bear his signatures. For this purpose, the plaintiffs-respondents submitted an application for examination of a handwriting expert to compare the signatures of Jagdev Singh (defendant-1) on the memo of partition and the rapat roznamcha (Ex P1) with his other standard signatures. The defendants-petitioners opposed the said prayer and stated that the plaintiffs should have examined the hand writing expert while leading their evidence in the affirmative. The learned Civil Judge (Jr Divn), as already noticed, allowed the application of the plaintiffs-respondents and permitted them to examine a hand writing expert in their rebuttal evidence, which order, as already noticed, is assailed by way of the present petition.

At the motion stage, the learned Single Judge vide order dated 16.11.1999, in view of the judgment passed by this Court in ***Bhika Ram v. Ram Niwas and ors*** (1998-2) PLR 484 admitted the case to DB. In Bhika Ram's case (supra), a learned Single Judge of this Court, in view of the embargo contained in sub clause (b) of the proviso to Section 115(1) of the Code of Civil Procedure (CPC – for short) had held that if the petitioner fails in the suit and ultimately a judgment and decree is passed against him on the basis of the impugned order, he would be entitled to challenge the impugned order in appeal against the final decree under Rule 1(a) of Order 43 read with Section 105 CPC. Therefore, it could not be said that the impugned order, if allowed to stand, would occasion a failure of justice so as to justify interference under Section 115 CPC. In substance, by virtue of clause (b) aforesaid, the High Court would not interfere with an order unless the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made. It was observed by the learned Single Judge while referring the present case to DB that if such a view is accepted to be correct, a revision in no case would at all be maintainable as it is too well settled and conceded that there is no such inter-locutary order, veracity or legality whereof cannot be ultimately challenged in appeal and if that be so, the provision of revision contained in Section 115 of the CPC would become obsolete. It is, therefore, evident that the reference to DB has been made in view of the embargo contained in sub clause (b) of the proviso to Section 115(1) CPC which was to the effect that the High Court shall not under Section 115(1), vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceedings, except where the order, if allowed to stand,

would occasion a failure of justice or cause irreparable injury to the party against whom it was made so as to entitle a party to invoke the revisional jurisdiction of the High Court. However, this aspect is now not of much significance as the provisions of the proviso to Section 115(1) including sub clause (b) has been substituted by Section 12(i) of the CPC (Amendment) Act 1999 (Act 1946 of 1999) w.e.f. 1.7.2002. The said sub clause (b) of the proviso to Section 115(1) CPC has been deleted and is no longer in the statute. The validity of the amended provisions of the CPC as brought into force by the CPC (Amendment) Act 1999 w.e.f. 1.7.2002 including that of Section 12(i) were considered by the Supreme Court in ***Salem Advocate Bar Association T.N. v. Union of India*** AIR 2005 SC 3353 wherein it was observed as follows:-

> **"**42**.** Section 115 of the Code vests power of revision in the High Court over courts subordinate to it. Proviso to Section 115(1) of the Code before the amendment by Act 46 of 1999 read as under:
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> "Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where
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> (*a*) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or

(*b*) the order, if allowed to stand, would occasion a *failure of justice or cause irreparable injury* to the party against whom it was made."

43. Now, the aforesaid proviso has been substituted by the following proviso:

"Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings."

44. The aforesaid clause (*b*) stands omitted. The question is about the constitutional powers of the High Courts under Article 227 on account of omission made in Section 115 of the Code. The question stands settled by a decision of this Court in *Surya Dev Rai* v. *Ram Chander Rai and others* (2003(6) SCC 675) holding that the power of the High Court under Articles 226 and 227 of the Constitution is always in addition to the revisional jurisdiction conferred on it. Curtailment of revisional jurisdiction of the High Court under Section 115 of the Code does not take away and could not have taken away the constitutional jurisdiction of the High Court. The power exists,

> untrammelled by the amendment in Section 115 and is available to be exercised subject to rules of self-discipline and practice which are as well settled. "

In view of the above, the reference to DB that was made by the learned Single Judge vide order dated 16.11.1999 no longer survives. In any case, as held in Salem Advocate Bar Association's case (supra), a revision against an order passed by an inferior Court can always be entertained in exercise of the powers of this Court under Article 227 of the Constitution of India. The present petition though has been filed under Section 115 CPC, however, the nomenclature under which the same is filed is not quite relevant and that does not debar the Court from exercising its jurisdiction which it otherwise possesses unless there is a special procedure prescribed which procedure is mandatory. In a case where the Court finds that the petitioner could not invoke the jurisdiction of this Court under Section 115 of the CPC, the Court can certainly treat the petition to be one under Article 227 of the Constitution of India. In fact this Court in ***M/s Ajit Cotton Ginning Pressing Daal and Steel Rolling Mills and others v. Steel Authority of*** India C.R. No.582 of 2004 decided on 28.2.2005 vide a detailed order has held that a petition filed under Section 115 CPC can be treated to be one under Article 227 of the Constitution of India. The following observations are apposite:-

> "By virtue of amendment in Code of Civil Procedure, 1908, w.e.f. 1.7.2002, the revisional jurisdiction of the High Court under Section 115 of the Code has been curtailed but, such amendment cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of

the Constitution. The interlocutory orders passed by the Courts subordinate to the High Court against which remedy of revision has been excluded by virtue of Code of Civil Procedure Amendment Act No.46 of 1999, are nevertheless open to challenge and continue to be subject to certiorari and supervisory jurisdiction of the High Court. The curtailment of revisional jurisdiction of the High Court does not take away – and could not have taken away – the constitutional jurisdiction of the High Court to issue a writ of certiorari to a civil Court nor the power of superintendence conferred on the High Court under Article 227 of the Constitution is taken away or whittled down. Reference may be made to judgment of the Supreme Court reported as ***Surya Dev Rai v. Rai Chander Rai and ors,*** AIR 2003 SC 3044, wherein it was held to the following effect:-

> "We are of the opinion that the curtailment of revisional jurisdiction of the High Court does not take away – and could not have taken away – the constitutional jurisdiction of the High Court to issue a writ of certiorari to a civil Court nor the power of superintendence conferred on the High Court under Article 227 of the Constitution is taken away or whittled down. The power exists, untrammeled by the amendment in Section 115 of the CPC, and is available to the exercised subject to rules of self discipline and practice which are well settled."

In the circumstances, we are of the view that even though the present petition has been filed under Section 115 CPC, it can be treated as a petition under Article 227 of the Constitution of India. The parameters for invoking the jurisdiction of this Court under Article 227 of the Constitution of India have been well delineated and inter alia include cases where subordinate Courts or Tribunals have failed or refused to exercise jurisdiction vested in them, where there has been erroneous assumption or excess of jurisdiction, cases where there is an error of law apparent on the face of record as distinguished from a mere mistake of law or error of law relating to jurisdiction, violation of the principles of natural justice, where a finding has been arrived at which is perverse or based on no material or there has been a violation of procedure which prejudices the rights of the parties, the High Court can interfere with the orders of the Courts and the Tribunals subordinate to it. However, in exercise of the said jurisdiction under Article 227 of the Constitution of India, which is supervisory in character, this Court is not to act as an appellate Court. Besides, the jurisdiction is to be exercised sparingly and only in appropriate cases in order to keep the subordinate Courts within the bound of their authority and not for correcting mere errors.

In the present case, the question that is involved is whether the plaintiffs-respondents could examine the handwriting expert in the rebuttal evidence after having led their evidence in the affirmative on the issues the onus of which was on them. The plaintiffs in support of their case want to prove the memo of partition dated 12.5.1989 and the rapat roznamcha which was entered with the Halqa Patwari on 29.7.1994. The onus of proving the said documents was on them. Therefore, it is for them to prove the said

documents in accordance with law. The scope and ambit of the right of the plaintiffs to lead evidence in rebuttal on issues, the onus of proof of which is on the plaintiffs was considered by a Division Bench of this Court in ***Surjit Singh and ors v. Jagtar Singh and ors*** AIR 2007 P&H, 1. After elaborate consideration of the entire matter, one of us (S.S.Nijjar, J) speaking for the Bench observed as follows:-

> "In our opinion, Order 18 Rule 3 of the CPC would not give a right to the plaintiff to lead evidence in rebuttal on issues in which the onus of proof is on the plaintiff. Accepting such an interpretation would be to ignore a vital part of Order 18 Rule 3 of the CPC. The rule clearly postulates that "the party beginning, may, at his option, either produce his evidence on these issues or reserve it by way of answer to the evidence produced by the other parties". No matter, how liberally a provision in the statute is required to be interpreted, by interpretation it cannot be amended. Whilst construing a statutory provision the Court cannot reconstruct it. The rule consciously provides the parties with an option either to produce the evidence in support of the issues or to reserve it by making a statement to that effect. The statement itself may well be liberally construed to avoid any unnecessary technical obstacles. One such example has been given by the Division Bench in the case of **Smt. Jaswant Kaur (supra) (AIR 1983 P&H 210).** It has been held that if a statement is made by the Advocate for the plaintiff that "the plaintiff closes its

evidence in the affirmative only," the same would be read to mean that the plaintiff had reserved its right to lead evidence in rebuttal. We are, therefore, unable to agree with the observations made by the learned Single Judge in the case of **Kashmir Kaur (supra) (2000(2) RCR (Civil) 133)** that he is entitled to lead evidence in rebuttal as a matter of right. In our opinion, this observation runs contrary to the observations of the Division Bench in **Jaswant Kaur's case (supra).** The Division Bench has even fixed the maximum time on which the plaintiff has to exercise his option to reserve the right to lead evidence in rebuttal. It has been clearly held that such a reservation has to be made at the time of the close of the evidence of the plaintiff. We are also unable to agree with the observations of the learned Single Judge in the case of **M/s Punjab Steel Corporation (supra) (2002(1) PLR 99)**. In that case the plaintiff sought to lead evidence in rebuttal, after the close of the evidence of the defence. At that stage, the plaintiff cannot be permitted to reserve the right to lead evidence in rebuttal. The observations of the learned Single Judge run contrary to the law laid down by the Division Bench in the case of **Smt.Jaswant Kaur (supra).** No doubt, the Division Bench clearly lays down that an overly strict view cannot be taken about the modality of reserving the right of rebuttal. But at the same time, it has been held that the last stage for exercising option to reserve the right of rebuttal can well be

> before the other party begins its evidence. We are in respectful agreement with the aforesaid observations of the Division Bench in the case of **Jaswant Kaur (supra) and R.N.Mittal, J. in National Fertilizers Ltd. (supra) (AIR 1982 P&H 432).”**

In terms of the aforesaid dictum, it is evident that the plaintiffs-respondents cannot as a matter of right lead evidence in rebuttal on issues, the onus of proof of which is on them. The plaintiffs-respondents had concluded their evidence in the affirmative on 11.3.1998 and reserved their right to produce evidence in rebuttal. However, the onus to prove the memo of partition dated 12.5.1989 and the rapat roznamcha which was got entered with the Halqa Patwari on 29.7.1994 was on them (plaintiffs-respondents). Therefore, they could not examine the handwriting expert as a matter of right. Therefore, it is to be seen in the facts and circumstances of each case whether the plaintiffs can examine a handwriting expert in rebuttal. The ground for examination of the handwriting expert is that the defendant-Jagdev Singh while appearing in the witness box did not give clear answer as regards his signatures on the memo of partition dated 12.5.1989 and the rapat roznamcha which was got entered with the Halqa Patwari on 29.7.1994. In this regard, it is appropriate to note that it is for the plaintiffs to prove their case in accordance with law on the basis of evidence. The fact that Jagdev Singh in his cross-examination did not make clear the point as to whether the said documents bear his signatures would not per se entitle the plaintiffs to examine a handwriting expert in rebuttal although for not giving answers to the questions posed during cross-examination may entail the drawing of an adverse inference for the purposes of appreciation of

evidence. However, it would not give a right to the plaintiffs to make clear the point by producing a handwriting expert at that stage. In the circumstances, the learned trial Court while passing the impugned order has violated the procedure provided for leading evidence which has resulted in causing prejudice to the petitioners and would vitiate the impugned order.

For the foregoing reasons, the civil revision petition is allowed and the impugned order dated 16.11.1998 passed by the learned trial Court is set aside. However, nothing stated hereinabove shall be taken as an expression on the merits of the controversy involved in the suit between the parties.

(S.S.NIJJAR)
JUDGE

17.1.2007. (S.S.SARON)
ASR JUDGE